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IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-152

IN THE MATTER OF THE APPLICATION
of
JOHN J. ELLIOT, LUDVIK J. MACHO, THOMAS J. FITZSIMMONS, SAM GELBER and CARMINE PICCOLO,

Petitioners,

For a Judgment pursuant to Article 78 CPLR

against

SOLOMON HOBERMAN, Personnel Director of the City of New York, and together with JAMES W. SMITH, and MILTON SAMORODIN, constituting the Department of Personnel of the City of New York and the CITY CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK,

Respondents.

Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

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Respondents.

Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

Petitioners, Ludvik J. Macho, Thomas J. Fitzsimmons, Sam Gelber and Carmine Piccolo, pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above entitled action pursuant to its decision rendered May 26, 1971.

Opinions Below.

The original decision and memorandum of the Court of Appeals of the State of New York (Appendix A) is reported at 28 N. Y. 2d 530. The decision of said court granting petitioners' motion for reargument (Appendix B) is not reported. The court's memorandum decision and the dissenting opinion following reargument (Appendix C) is not yet reported. The decision denying petitioners' motion to amend the remittitur (Appendix D) is not reported.

Jurisdiction.

The original decision of the Court of Appeals which reversed an order of the Appellate Division, First Department, and dismissed the petition herein, was rendered January 7, 1971. A timely motion for reargument was made and granted, and reargument was had on April 22, 1971. On May 26, 1971, the court rendered its decision and judgment, adhering to its earlier decision.

The jurisdiction of this court is invoked pursuant to 28 U. S. C. §1257 (3).

Questions Presented.

On January 18, 1969, respondent Civil Service Commission administered a written examination for promotion to the rank of captain in the Police Department of the City of New York. This examination had a dual function. It served both as a "regular" examination to be taken by any qualified and eligible lieutenant, and, in the case of petitioners herein, as a "special" make-up examination. Petitioners, for one reason or another, had been unable to take the 1964 and 1966 regular examinations, although qualified and eligible.

It is undisputed that, on the basis of the official tentative correct key answers published by respondent, each of the petitioners would have attained a passing score of 75 per cent, or higher, on the "special" examination, and would have had the right to be certified as eligible for promotion to the rank of captain.

On March 18, 1969, before the examinations had been officially graded, respondent issued a press release announcing cancellation of the examination, allegedly because 12 questions had been taken from a 1959 California police promotion examination which the examiner thought was unpublished, but which had, in fact, been published in the 1962 Police Yearbook and was in the public domain. Respondents allegedly concluded that this factor destroyed the competitive nature of the examination. There was no proof of this.

The following questions are presented:

(1) Was it a denial of petitioners' rights to due process and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States for respondent to cancel the "special" examination, allegedly because the inclusion of certain questions might have impaired the competitiveness of the examination, without any proof that these questions could or in fact did impair the competitiveness of the examination?

(2) Under the decision of the court below there can be no objective standard by which to test whether respondents have acted illegally in withdrawing an examination. Since the Commission admits that it "will in the future utilize questions which had been used previously," the mere possibility, not required to be proven as a fact, that an examinee may have gained some familiarity with repeat questions will exist in every such civil service or professional licensing examination. Is this not violative of the Fourteenth Amendment, since the Commission

has been given *carte blanche* to withdraw any examination in which it does not like the results without any objective standard by which a court can review its action?

(3) The decision of the court below is based on assumptions that are unwarranted by and directly contrary to the facts established by the record on appeal. As such, is it not violative of petitioners' Fourteenth Amendment rights to due process?

The foregoing constitutional questions were raised in petitioners' motion for reargument in the Court of Appeals and argued upon reargument.

Statement.

Central to our analysis, and a point we feel has been disregarded by the court below, is the admitted fact that the promotion examination given on January 18, 1969, served both as a "regular" examination and, in the case of petitioners, as a separate "special" examination (12, 24).* It was designated as Special Examination No. 9961 for petitioners Elliott and Macho, who were qualified and eligible for promotion to Captain since 1964 but were prevented from or unable to take the regular examination in 1964, and Special Examination No. 1454 for petitioners Fitzsimmons, Gelber and Piccolo, who were eligible for, but unable to take, the 1966 examination (12, 23).

Petitioners (and a Lieutenant Schimmel who is not a party to this litigation) are the only persons interested in or affected by the "special" examination for promotion to captain held January 18, 1969.**

---

*Numerical references in parentheses are to pages of the Record on Appeal to the New York Court of Appeals.

**Originally there were seven candidates who took the "special" examination. Of these, Lieutenant Elliott was promoted to Captain from the eligible list established as a result of the 1966 examination. Lieutenant Harding has retired from the Police Department and is no longer an interested party.

The "special" written examination consisted of 135 multiple choice questions, "all of equal weight" (23). The passing score for petitioners was 75 per cent (13, 23). Twelve of the questions dealt with correct English usage. There was no requirement, however, that any of these petitioners correctly answer these questions, or any of them, in order to pass the examination. A passing grade of 75 per cent could be attained without receiving any credit for the questions on English usage (13, 22).

It is undisputed that, on the basis of the tentative correct key answers published by the Commission, each of the petitioners would have passed the "special" examination, even if he were to receive no credit for any of the 12 English usage questions.

On March 18, 1969, before the examinations were officially graded, the Commission issued a press release in which it was stated that the January examinations were cancelled, allegedly because the 12 questions on English usage were taken from a 1959 California promotion examination which the examiner claimed to have thought was unpublished. An investigation revealed that the questions were identical to those published in the 1962 Police Yearbook, a publication available throughout the country as a study guide. According to respondents, the inclusion of those 12 questions "destroys the competitive nature of the examination, raises questions concerning the integrity of the examining process and reduces the reliability of the test, all in violation of the New York State Constitution" (49).

Petitioners thereupon instituted the present proceeding for an order annulling respondents' action in cancelling the examination, and directing respondents to grade the examinations, with or without the 12 questions in dispute. Special Term granted petitioners the relief requested (5-8; opinion of Marks, J., at 48-55). The

Appellate Division, First Department, unanimously affirmed the order annuling the cancellation (33 A. D. 2d 753). On further appeal, the Court of Appeals reversed the decisions below and directed that the petition be dismissed (28 N. Y. 2d 530). It adhered to that decision on reargument.

Reasons for Granting the Writ.

1. The vital importance of maintaining a loyal, professional police force, attuned to the many, ever-burgeoning police problems that beset the nation, and particularly its great cities, needs no explication. It is a truism that promotion on merit is the keystone to the formation and continuance of such a force.

It requires no esoteric knowledge of how men think and function, to appreciate that the cancellation of a promotion examination which was patiently awaited for several years, and which was prepared for by long and arduous study, can be demoralizingly frustrating. This is especially so where the official tentative key answers indicate that each of the candidates would have passed; and, the cancellation as to them is arbitrary and capricious, and in cavalier disregard of their vested rights.

Whether cancellation of a promotion examination after it has been taken and passed by police officers whose promotion to the rank of captain must only await administrative detail, is a denial of constitutionally guaranteed rights, is a matter of grave importance not only to petitioners, but to every police officer employed under a merit system throughout the nation.

We urge, therefore, that the need for constitutional guidelines to be followed in the cancellation of promotion examinations of police officers and others in like positions is of sufficient import to warrant consideration by this Court.

2. It often has been pointed out:

> "A test or examination, to be competitive, must employ an objective standard or measure. Where the standard or measure is wholly subjective to the examiners, it differs in effect in no respect from an uncontrolled opinion of the examiners and cannot be termed competitive.
>
> * * *
>
> "An examination cannot be classed as competitive unless it conforms to measures or standards which are sufficiently objective to be capable of being challenged and reviewed, when necessary, by other examiners of equal ability and experience" (*Fink v. Finegan*, 270 N. Y. 356, 361-362).

To insure competitiveness in the civil service, it is equally essential that there be an objective standard by which to measure the Commission's action in withdrawing and nullifying a duly given examination.

If the commission is permitted to throw out an examination on the basis of a wholly subjective standard, the possibilities for abuse and discrimination are obvious. Dissatisfied with the outcome of an examination, or with the particular individuals scoring the highest grades, the commission can simply cancel the examination. To guard against such abuses, there must be some objective standard by which to test its action. The decision of the court below has made it impossible to have such an objective standard.

The affidavit of Solomon Hoberman, Chairman of the City Civil Service Commission and the Director of the Department of Personnel (27), frankly admits that the "City has in the past and will in the future utilize questions which has been used previously * * * Indeed, the

City is constantly adding to its bank of good questions those which have proved to be unambiguous, practicable and searching * * *" (30).

This is common practice, and we do not find fault with it. As the court noted in *Bruns v. Suffolk County Civil Service Comm'n*, 56 Misc. 2d 925, "questions in civil service examinations are frequently repeated in other examinations, not only because the preparation of each new question is costly, but because in the considered opinion of the Civil Service Commission it results in greater efficiency. * * * *Approximately 80 per cent or more of the questions in State civil service examinations have been used before*" (italics added). As all lawyers and judges know, this is also the practice with the bar examinations, and one of the principal methods of study for the bar is to review the questions that have appeared on former examinations.

The vice in the decision of the court below is that it sanctions the cancelling of a duly given examination on the mere possibility that an examinee, through legitimate study, may have gained some familiarity with repeat questions. The decision of the court below does not require any *proof* that an examinee actually had such knowledge, or that he came by it in any manner other than legitimate study. The mere possibility is now enough to throw out the examination and to place the commission's action beyond the scope of judicial review.

That possibility, however, is and will continue to be present in every civil service and professional licensing examination so long as the practice of repeating questions continues. This excuse, therefore, will always be available to the commission to justify its cancellation of an examination. The measure of the commission's action will be purely subjective, not subject to challenge or review by the court.

It is "the duty of courts to be watchful for the constitutional rights of a citizen, and against any stealthy encroachments thereon" (*Mapp v. Ohio*, 367 U. S. 643, 647). In this case, however, the court below not only failed to do its duty, it has given the municipal civil service commission the means by which to discriminate in the administration of examinations and enabled it to carry out the constitutional and legislative mandate "with an evil eye and an unequal hand" (*Yick Wo v. Hopkins*, 118 U. S. 356, 373-374).

As noted, there is not and cannot be any objective standard by which to measure the legality of the commission's action or to determine whether it deprived petitioners of due process and equal protection of the law. In analogous situations, this court has held:

> "'It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case' (*Giaccio v. Pennsylvania*, 382 U. S. 399, 402-403)."

It seems clear in the case at bar that the "special" examination would not have been cancelled, had there not been a complaint of discrimination filed with the New York State Division of Human Rights (50).

Each of the petitioners would have received a passing grade, been certified as eligible for promotion and, in the ordinary course, could have been promoted to Captain with all the benefits and privileges accruing therefrom. All of these rights which vested in them upon passing the examination have been taken away from them without due process of law.

The decision of the court below, sanctioning cancellation of the examination without proof that its competitiveness

was actually impaired to any degree, denies petitioners due process and the equal protection of the laws guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

Rights earned by decades of unremitting labor in public service should not be cavalierly regarded, to be negated and ignored by possibilities that have never blossomed into actual fact. Particularly is this so when the labors have been expended in an occupation attended by perils and hazards to the person, found in no other public service.

This action of the respondent Commission, now sanctioned by New York's highest court, will perforce be copied by other municipal civil service commissions throughout the country in cases where they wish to annul promotion examinations. This would have the effect of undermining the entire merit system and demoralizing professional employees who have built their careers upon it. A definitive statement by this Court as to the legality of such conduct is urgently needed.

3. The decision of the court below is based on assumptions that are unwarranted by and directly contrary to the facts established by the record on appeal. To permit such a decision to stand will undermine the integrity of the judicial process.

The judiciary is as much obliged to honor and safeguard constitutionally guaranteed rights as are the legislative and executive branches of government (*Shelly v. Kraemer*, 334 U. S. 1, 14-16; *People v. Utica Daw's Drug Co.*, 16 A. D. 2d 12, 17). A court's decision must be reached in a manner that accords the parties due process of law (*Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U. S. 673, 681-682). That was not done in this case.

While "no hard and fast rule can be laid down as to what is or is not due process" (*Slochower v. Board of Education*, 350 U. S. 551, 559), at the very least, due process requires that a court decide the issues presented on the basis of the facts established by the record and not on unwarranted assumptions which the parties have had no opportunity to refute.

*The erroneous assumption with respect to "impair[ment of] the competitiveness of the examination * * *"*

We have already pointed out that petitioners and Lieutenant Schimmel are the *only* persons interested in and affected by the results of the "special" examination. None of them had prior knowledge of the questions or answers. Thus, there is no possible way in which the "competitiveness of the examination" could have been impaired.

Moreover, in the case of petitioners, who were taking a "special" examination, the passing grade was fixed at 75% (13, 22). Based on the tentative key answers released by the commission, all of the petitioners would have attained a score of 75% or higher, without receiving any credit for the disputed questions (14). Since all of the petitioners would have passed the "special" examination, there was no impairment of "competitiveness."

*The erroneous assumption with respect to "familiarity with the questions in dispute, and knowledge of the official answers to them, derived by some examinees * * *"*

Paragraph "28" of the verified petition states (15):

> "In fact, the petitioners never saw the 12 questions prior to taking the examination on January 18, 1969; and prior to taking the examination on January 18, 1969, the petitioners had no knowledge that questions in 'correct English us-

age' would be asked therein, since no such questions had been included in police promotion examinations prior thereto."

In support of these allegations, petitioners Elliott, Macho, Fitzsimmons, Gelber and Piccolo each executed an affidavit* stating (21):

"I am one of the petitioners in this proceeding.

"Prior to taking the examination on January 18, 1969, I never saw the 12 'correct English usage' or grammar questions which appeared in the written examination for promotion to Captain PD held January 18, 1969.

"Prior to taking the examination on January 18, 1969, I had no knowledge that questions in 'correct English usage' or grammar would be asked in the aforesaid promotion examination."

The commission has not controverted these sworn statements (25). Nowhere in this record is it suggested or claimed that any one of the examinees who participated in the "special" or regular examination was familiar with the questions or had knowledge of the official answers.

It is clear from the foregoing, that the decision of the court below is based on completely incorrect and unwarranted assumptions, rather than on the facts established by the record on appeal. To permit such a decision to stand is violative of petitioners' rights to due process under the Fourteenth Amendment to the Constitution of the United States.

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*Lieutenant Schimmel, while not a party to this suit, will execute an affidavit to the same effect, if necessary.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: July 27, 1971.

Respectfully submitted,

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Attorney for Petitioners.

THOMAS R. NEWMAN,
BENJAMIN H. SIFF,
Of Counsel.

Appendix A.

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MEMORANDUM. It is a "fair argument", and this is the test of the arbitrariness with which the commission is charged (see *Matter of Wirzberger v. Watson*, 305 N. Y. 507, 513), first, that familiarity with the questions in dispute, and knowledge of the official answers to them, derived by some examinees from prior study of the 1962 *Police Yearbook* could well impair the competitiveness of the examination, and, second, that the possibility of the acquisition of such prior knowledge was not so unreasonable or so remote as to warrant the finding that the commission's action was arbitrary. Our decision in *Matter of Chironna v. Watson* (304 N. Y. 255, mot. for rearg. den. 304 N. Y. 738), which the parties construe with some divergence, dealt with "defects which concededly made the original examinations noncompetitive" (p. 258), and hence with the propriety of the corrective action undertaken, and did not, of course, encroach upon the broad area of administrative discretion conferred upon the commission in determining the basic issue of competitiveness.

The orders appealed from should be reversed, without costs the determination of the municipal civil service commission reinstated, and the petitions dismissed.

In the Matter of Elliott: Chief Judge FULD and Judges BURKE, BERGAN, BREITEL, JASEN and GIBSON concur; Judge SCILEPPI dissents and votes to affirm on the opinion at Special Term in *Matter of Katz v. Hoberman*, decided herewith.

Order reversed, without costs, the determination of the municipal civil service commission reinstated and the petition dismissed in a memorandum.

Appendix B.

STATE OF NEW YORK, COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Fifteenth day of April A. D. 1971.

Present,

Hon. Stanley H. Fuld,
Chief Judge, presiding.

Mo. No. 289

IN THE MATTER

of

The Application of JOHN J. ELLIOT & ors.,

Respondents,

for a judgment & c.

vs.

SOLOMON HOBERMAN, Personnel Director of the City of New York, and together with JAMES W. SMITH and MILTON SAMORODIN, constituting the Department of Personnel of the City of New York and the City Civil Service Commission of the City of New York,

Appellants.

A motion for reargument of the above cause having heretofore been made upon the part of the respondents herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the case set down for argument during the week of April 19, 1971.

A copy

GEARON KIMBALL
Deputy Clerk

(Seal.)

Appendix C.

Memorandum

COURT OF APPEALS,

STATE OF NEW YORK.

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1. No. 436. 70

IN THE MATTER

of

The Application of ARTHUR KATZ & ors., & c.,

Respondents,

vs.

SOLOMON HOBERMAN, as Personnel Director of the Department of Personnel of the City of New York & c., & ors., & c.,

Appellants.

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1. No. 437. 70

IN THE MATTER

of

The Application of JOHN J. ELLIOT & ors.,

Respondents,

for a judgment & c.

vs.

SOLOMON HOBERMAN, Personnel Director of the City of New York, & c., & ors., & c.,

Appellants.

MEMORANDUM:

Upon reargument, we adhere to our original decision and memorandum and write further only to touch upon certain questions suggested on the reargument—one as to the propriety of the common practice of using questions propounded on previous examinations and the other as to practicability of excising the questions here in dispute.

The examination was cancelled, before any of the papers had been graded, when the Commission learned that it had been mistaken in believing that there had not been released to the public the California examination from which it had extracted and used, in completely identical form, a block of 12 multiple-part questions. Neither the Commission's cancellation of the examination nor our decision sustaining that action reflected adversely upon the general and entirely proper practice of utilizing previous examinations as sources of questions. Appellant Director, in opposing the article 78 application in this case, stated that such is the appellants' practice but that they "would never excerpt 12 questions ad seriatim from a single previous examination for inclusion in another examination; nor would they lump together a series of questions borrowed from a previous examination."

As respects the practicability of excising the 12 disputed questions, which dealt with correct English usage, it is clear that the decision to apply tests in this subject to candidates for police captaincies was within the area of the Commission's authority and, accordingly, that judicial excision of the questions would constitute an improper intrusion upon the Commission's prerogatives and a substitution of the court's judgment for that of the Commission, in contravention of the fundamental law obtaining in this area.

SCILEPPI, J. (dissenting):

Today, a majority of this Court, upon reargument, adheres to its reversal in *Matter of Katz v. Hoberman* and *Matter of Elliot v. Hoberman* (28 N. Y. 2d 530). I dissented from the original determination for the reasons expressed in the opinion at Special Term (61 Misc. 2d 411) and, now, again dissent on the opinion at Special Term. I add only the following comments.

There is no factual dispute in this case. Respondents, lieutenants in the New York City Police Department, New York City Transit Police Department and New York City Housing Authority Police, are civil service employees and were eligible to take promotional examinations to the position of captain in their respective departments. On January 18, 1969 appellants conducted such an examination at which time respondents competed. On March 18, 1969 before any of the papers had been graded, the City Department of Personnel issued a press release in which the January examination was cancelled and a new examination was scheduled for May 24, 1969. It was stated therein, that 12 questions on the January examination were originally taken from a 1959 California police promotional examination which the examiner had thought was unpublished but that an investigation revealed that the questions were identical to those published in the *1962 Police Yearbook*, and since that publication had been available in the New York area for several years, it was concluded by the Commission that:

> This destroys the competitive nature of the examination, raises questions concerning the integrity of the examining process and reduces reliability of the test, all in violation of the New York State Constitution.

Upon the cancellation of the January examination and the scheduling of a new examination, respondents commenced the instant Article 78 proceedings.

The Appellate Division (33 A. D. 2d 753), by affirming orders of Special Term, found that appellants had acted arbitrarily because the use of the 12 questions did not impair the competitiveness of the examination (61 Misc. 2d 411). A majority in this Court reversed, and reinstated the determination of the Civil Service Commission (28 N. Y. 2d 530). It reasoned that appellant's action in cancelling the examination could not be considered arbitrary because, vested with broad administrative discretion, the Commission could reasonably determine that the competitiveness of the examination was impaired by the possibility that some candidates may have used the *1962 Police Yearbook* in their preparation for the examination. The court has placed reliance on our decision in *Matter of Chironna v. Watson* (304 N. Y. 255 mot. for rearg. den. 304 N. Y. 738). This case is, however, simply not in point. There, after an open book examination had been administered and graded, it developed that five questions in that examination had been printed in a reference book, and that some candidates might have had access to this book in the examination room. It was conceded there, however, that this factor rendered the examination noncompetitive; hence, the sole question before the Court was not that of competitiveness but the propriety of the corrective measures employed by the Civil Service Commission. Unlike *Chironna*, the examinations involved in this case were not "open book," and we are required to pass on the basic issue of competitiveness.

Now, on reargument, the majority attempts clarification by adding that this decision is to have no adverse effect upon the accepted practice of utilizing previous examination questions in the preparation of subsequent

examinations. Further, it finds some significance in the fact that the disputed 12 questions were grouped together, rather than interspersed throughout the examination. If prior publication of questions is to be the criteria for a declaration of noncompetitiveness, then it should make no difference where they appear on the examination. Hence, I remain unpersuaded by this hypertechnical rationale employed by the majority.

In reviewing the administrative action taken against respondents, the basic question presented is, of course, whether the cancellation of the examination was arbitrary, capricious or unreasonable. Our constitution provides that civil service appointments and promotions must "be made according to merit and fitness to be ascertained, as far as practicable, by examinations which, as far as practicable, shall be competitive * * *" (N. Y. Const., Art. V, § 6; see Civil Service Law, § 50; *Matter of Fink v. Finegan*, 270 N. Y. 356). Appellants have been charged with the performance with this mandate. Although they are vested wide latitude of discretion in this regard (see *Matter of Wirzberger v. Watson*, 305 N. Y. 507, 513), it is by no means unfettered, and is subject to review by this Court. The reason for this is clear. Inasmuch as the competitiveness of civil service examinations is a concept embodied in our constitution, decisions, such as those made by the appellants herein, are to be treated as questions of law (see CPLR 7803 [subd. 3]). Stated differently, appellants' discretion in these matters, does not give them the power to act without standards and it is the constitution, as construed by the courts, which is the source of the criteria which are to be employed by civil service commissions in determining whether or not a particular examination is defective.

Thus, if the examinations involved in the cases at bar remained competitive, despite the prior publication, then appellants have abused their power as a matter of law

since their action is devoid of a viable standard. This question was answered in the affirmative by the courts below; and, as I have indicated, I am in complete agreement with the conclusions that no proof was adduced which would establish such infirmity in the examination.

It is significant here that neither the Civil Service Commission nor for that matter any of the other appellants, had any proof that any candidate for promotion had seen the *Police Yearbook* before the examination was administered. Indeed, appellants' action seems predicated on the mere possibility that this was in fact what occurred. I am unable to see how this speculative assumption can be viewed as being sufficient to sustain their action. But even assuming that all candidates had read and studied the *Police Yearbook*, the competitiveness of the examination would nevertheless remain unimpaired. As is abundantly clear, prior to the examination candidates were given a suggested bibliography and specifically advised in a circular prepared by the New York City Police Academy and acquiesced in by the Commission, that:

> The forthcoming written tests for promotion in the police service (NYCPD Transit PD, Housing PD) will be of the multiple-choice type. *The questions in these tests will be substantially based on, but not restricted to,* materials contained in the authoritative texts, periodicals and publications listed here. Note the fact that although these many sources are listed, candidates should not assume that equal emphasis will be given to each source, nor that the order of the sources is related to the order of the questions on the test, nor that all the listed materials will in fact be used, nor that candidates are expected to be conversant

> with every word in every text or reference listed. This list has been prepared solely for your convenience and as a guide to your study efforts. (Emphasis supplied.)

It is my view that upon receipt of this information, a prudent candidate for promotion would immerse himself in the materials listed and other relevant sources so as to prepare for the examination. Though the *Police Yearbook* was not named in the bibliography, there is no question but that it qualifies as an appropriate study material. Inasmuch as good preparation often involves the examination and study of the type of question which is usually employed by the examiners, I am at a loss to understand how efficient preparation for an examination would render it noncompetitive.

All candidates had this opportunity and I consider it manifestly arbitrary and unfair to penalize those whose study and research involved months of effort, particularly where, as here, the basic problem was created by the appellants and not by any candidate. In every examination, there are always those who are more diligent in their preparation. This is why some are successful and others are not. Some candidates, in the hope of attaining a passing grade, enroll in courses which are specifically geared to the study of materials upon which the examination is based. The majority's decision in these cases would seem to suggest that if an instructor should happen to mention questions which, fortuitously, are later found on the examination, appellants would be justified in cancelling the examination as noncompetitive. This is untenable and jeopardizes other types of examinations. For example, candidates for admission to the bar of this state have, for years, studied questions which purportedly were on old examinations. The decision reached by the court would appear to cast serious doubt on this long accepted practice. Though the court sanc-

tions the use of prior examination questions, it nevertheless concludes that if it is later discovered that they have *legitimately* entered the public domain, the examination is no longer competitive. Consequently, if a candidate wishes to refer to a sample-type question as a part of his preparation he must do so at the risk of a subsequent determination that the examination has become noncompetitive for that reason. This not only inhibits effective preparation, but also necessarily entails a senseless duplication of effect, on the part of both the candidate and the examiners. These considerations should not be overlooked in reaching a just determination of the cases at bar.

Accordingly, I am unable to agree that the prior publication of the 12 questions rendered the examination noncompetitive and conclude that the courts below have correctly determined that the cancellation of the examination was arbitrary, capricious and an abuse of discretion.

* * *

In each case: Upon reargument, original decision of reversal dated January 7, 1971 adhered to in a memorandum. All concur except Scileppi, J., who dissents and votes to affirm the order appealed from in an opinion.

Appendix D.

STATE OF NEW YORK, COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Tenth day of June A. D. 1971.

Present,

Hon. Stanley H. Fuld,
Chief Judge, presiding.

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1 Mo. No. 543

IN THE MATTER

of

The Application of JOHN J. ELLIOT & ors.,

Respondents,

for a judgment & c.

vs.

SOLOMON HOBERMAN, Personnel Director of the City of New York, & c., & ors., & c.,

Appellants.

& ano. proceeding—*Mtr. of Katz v. Hoberman.*

A motion for a stay and to amend the remittitur in the above causes having heretofore been made upon the part of the respondents herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied in each respect.

A copy

GEARON KIMBALL
Deputy Clerk

(Seal.)

(40,261)

Supreme Court, U.S.
FILED
AUG 23 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-152

In the Matter of the Application
of
JOHN J. ELLIOT, LUDVIK J. MACHO, THOMAS FITZSIMMONS, SAM GELBER and CARMINE PICCOLO,

Petitioners,

For a Judgment pursuant to Article 78 CPLR

against

SOLOMON HOBERMAN, Personnel Director of the City of New York, and together with JAMES W. SMITH and MILTON SAMORODIN, constituting the Department of Personnel of the City of New York and the CITY CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

J. LEE RANKIN,
Corporation Counsel of
The City of New York,
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STANLEY BUCHSBAUM,
EDMUND B. HENNEFELD,
of Counsel.

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Jurisdiction

Respondents do not question the jurisdiction as set forth in the Petition other than to contend (1) that no substantial federal question is presented in the within case, and (2) that no such question was timely raised in the courts below.

Questions Presented

The questions presented, respondents contend, are not as the Petition for Certiorari states.

The question actually presented is whether under New York State law the action of the New York City Civil Service Commission in cancelling a promotion examination before any of the papers were graded and scheduling another examination in its place to be held shortly thereafter, was arbitrary, capricious or unreasonable, or involved illegality or bad faith, all within standards in this regard imposed by New York State law.

A second, subsidiary question, is whether the supposed substantial federal question was timely raised in the courts below.

Statutory and Administrative Provisions Involved

NEW YORK CITY CHARTER:

"Personnel Director, Powers and Duties.—

§ 813. The personnel director shall have the following powers and duties in addition to the powers and duties vested in him as the head of the department:

* * *

c. At the direction of the civil service commission, to schedule and conduct examinations for positions in the civil service;"

RULES AND REGULATIONS OF THE NEW YORK CITY MUNICIPAL CIVIL SERVICE COMMISSION:

"Rule 4.5.4. Except as otherwise provided by resolution or regulation of the commission, no test, subject, part or record of an examination shall be subject to review, alteration or re-rating after the ratings of the examiners have been registered or attested thereon as required. However, the commission, at any time prior to the establishment or during the existence of an eligible list, may correct any manifest error or mistake made in connection with

an examination, on its own initiative or in the granting of a claim of manifest error or mistake. * * * The nature of such manifest error or mistake shall be set forth in its minutes."

Statement

On January 18, 1969, the written civil service examination in suit was held pursuant to the rules and regulations of the New York City Civil Service Commission for promotion to Captain in the New York City Police Department, the New York City Transit Police Department and the New York City Housing Authority Police Department.

The five petitioners were five of the many hundreds of candidates who took that examination. They differed from the other candidates, who were candidates in normal course taking the examination for the first time, only in that the petitioners, John J. Elliot and Ludvik J. Macho, were to have taken a promotion examination for Captain in the New York City Police Department examination held in 1964 but were unable to take the examination at that time, and the petitioners, Thomas J. Fitzsimmons, Sam Gelber and Carmine Piccolo, were in like situation with regard to an examination held in 1966 (11-12). All five petitioners were granted the right to take a special makeup examination in place of the original examination, that special makeup examination being the one set for January 18, 1969 (12). Since it was a makeup examination, the provision with respect to the original examination that a grade of 75% was required to pass carried over with respect to the new makeup examination (13).

On March 18, 1969, and before any of the papers had been graded (32), the City Department of Personnel issued a press release advising that the examination had been cancelled that day and that a new examination was being scheduled for May 24, 1969, to take its place (43).

The press release gave as the basis for the Commissioner's action that investigation by the Assistant Director

of Examinations had revealed that twelve of the questions were identical with questions previously published in the 1962 issue of the "Police Yearbook", that those twelve questions had been taken from a police promotion examination held in California in 1959, that the Personnel Department's examiners had obtained the questions from a California jurisdiction supposing them to be from an "unreleased" police promotion test and were unaware at the time that the questions had been published in the "Police Yearbook", and that the Yearbook itself had been available in the New York area for several years. For these reasons it was possible, the Commission Chairman said, that some candidates taking the examination had reviewed the twelve questions prior to the test (44). The questions themselves, he said, were "an essential part of the examination" (45), and to eliminate them would destroy the validity of the test (*ibid.*).

The release went on to state that the judgment of the Personnel Director was that inclusion of the questions impaired the "competitive nature of the examination", raised questions "concerning the integrity of the examining process and reduce(d) reliability of the test", all in violation of the New York Constitution, Article 5, § 6 (44).

The twelve questions used in the 1959 California police promotion test had been included in the 1962 Yearbook, and then in the January 18, 1969 examination, not only word-for-word but in the same order (61-62, 66-67, 87). The Yearbook was a publication of the Davis Publishing Company that had been sold and distributed in the New York area for a number of years (87).

On March 24, 1969, there appeared in the New York City Record a notice of the new examination to take the place of the other and to be held on May 24, 1969 (13). Candidates who had filed for the January 18 test were not required to re-file (44, 58).

An affidavit filed by the respondent Personnel Director stated that respondents (88-89),

> "would never excerpt 12 questions ad seriatim from a single previous examination for inclusion in another examination; nor would they lump together a series of questions borrowed from a previous examination."

The New York Supreme Court held that respondents had acted "arbitrarily" in cancelling the examination and accordingly granted judgment voiding that administrative determination (94-95). The New York Appellate Division affirmed on the opinion at Special Term (101). The New York Court of Appeals, however, reversed the Appellate Division and held that respondents' action was not arbitrary (Appendices A and C to Petition).

ARGUMENT

The sole issue before the State courts was the arbitrariness of an administrative act on New York State law grounds. No federal constitutional issue was raised until reargument in the New York Court of Appeals. At that point, it was too late to raise such an issue under New York practice.

Under the law of the State of New York, the exercise of the Commission's function of scheduling and conducting examinations may be the subject of judicial review only on a clear showing that the action taken by the Commission in the exercise of its conferred powers (New York City Charter § 813, subd. c), was arbitrary, capricious or unreasonable or that there was involved bad faith or illegality. *Matter of Conlon* v. *McCoy*, 22 N. Y. 2d 356, 362-363 (1968); *Matter of Wirzberger* v. *Watson*, 305 N. Y. 507, 513-514 (1953); *Matter of Cowen* v. *Reavy*, 283 N. Y. 232, 237 (1940), mot. den. 284 N. Y. 596 (1940); *Matter of Firshein* v. *Reavy*, 263 App. Div. 490 (3rd Dept., 1942), aff'd., 289 N. Y. 712 (1942); *Davis* v. *Wiener*, 260 App. Div. 127 (4th Dept., 1940). Thus, in *Matter of Wirzberger* v. *Watson*, 305 N. Y. 507 (1953), Chief Judge Lewis said (p. 513):

> "The decisional law on the problem is that the commission's fixing of the minimum requirements for admission to an examination is not to be interfered with by the courts if any fair argument can be made to sustain its action, '* * * even though they may differ from the commission as to its advisability' * * *." . .

In its memorandum opinion the Court of Appeals held that the action of the respondents was not arbitrary. On reargument it adhered to this decision and dealt with some aspects of that decision—one, its impact on the practice of using some questions propounded on prior examinations and, two, the practicability of exercising the questions in issue.

It is clear from the above that there is no federal question, substantial or otherwise, in this case. None was presented by the record, none was argued in the briefs of counsel to the New York Court of Appeals in the first instance, none is reflected in that Court's decision or opinion.

The question before the State courts was simply whether the action of respondents in cancelling the examination under the circumstances of this case was so arbitrary, capricious or unreasonable as to require the setting aside of that administrative determination. That was the sole question presented to the State courts, and it was the only question decided by the New York Supreme Court, the Appellate Division and the Court of Appeals. That Court's memorandum in deciding both this case and the companion case of *Matter of Katz* v. *Hoberman* (Appendices A and C to Petition) naturally makes no mention of any federal question. The first time the supposed federal question was raised was on the motion for reargument and on the reargument in the State Court of Appeals.

The Court of Appeals, in adhering to its original decision after the reargument, made no reference to the federal consfitutional question raised for the first time in connection with the reargument. Undoubtedly, this was because it was too late to raise such an issue.

Thereafter, the petitioner applied to the Court of Appeals to amend the remittitur to recite that the federal constitutional questions were presented and necessarily passed upon by the Court of Appeals. This was opposed on the ground that, under New York practice, constitutional issues could not be considered by the Court of Appeals unless they were raised in the lower courts, citing the following cases: *Matter of O'Neill* v. *Board of Regents*, 298 N. Y. 777 (1948; appeal dismissed); *Matter of Carroll* v. *Grumet*, 305 N. Y. 692 (1953; appeal dismissed); *Nathan* v. *Equitable Trust Co.*, 250 N. Y. 250, 253 (1929; judgment affirmed); *Nod-Away Co.* v. *Carroll*, 240 N. Y. 252 (1925; judgment affirmed); Cf., *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 128 (1945).

The Court of Appeals denied the application to amend the remittitur on June 14, 1971. This clearly was an application of the consistent New York practice requiring constitutional issues to be raised in a court below the level of the Court of Appeals. This Court recognizes the validity of such a rule and refuses to entertain appeals where it has not been complied with. See STERN & GRESSMAN, *Supreme Court Practice* (Fourth Ed.), § 3.27.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

August 19, 1971.

Respectfully submitted,

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